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IN THE
COURT OF APPEALS OF INDIANA

AURELIA WATTS, Individually, And as Administratrix for the Estate of Avis A. Price, deceased,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 49A05-0709-CV-542
HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY d/b/a WISHARD MEMORIAL HOSPITAL,	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D13-0110-CT-001588

June 24, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Wishard Memorial Hospital ("Wishard") admitted negligence in its treatment of Aurelia Watts's ("Watts") son's, Avis Price's ("Avis") injuries, which injuries caused Avis's death. Watt's sued Wishard both individually and as Administratix of Avis's estate. The trial court awarded Watts $11,879.86 in actual damages and $40,000 in attorney fees. Watts appeals and raises several issues, which we restate as:

I. Whether the trial court erred when it granted Wishard's motion for partial summary judgment on the issue of whether Watts qualified as Avis's dependent next of kin under the Wrongful Death Statute;

II. Whether the trial court abused its discretion when it denied Watts's motion to amend her complaint to add a claim of negligent infliction of emotional distress;

III. Whether the trial court abused its discretion when it admitted the testimony of Wishard's attorney fee expert;

IV. Whether the trial court abused its discretion when it awarded $40,000 in attorney fees.

V. Whether the trial court abused its discretion when it denied Watts's motion to strike Wishard's proposed findings of fact and conclusions of law.

We affirm.

Facts and Procedural History

On October 19, 1996, Watts's son, Avis, was attacked by several gang members at a park near his home. He was taken to Wishard Hospital at 1:00 a.m., and medical personnel determined that he had jaw pain, a possible zygomatic arch fracture, and an eye injury. He was also drunk. Avis was released from Wishard at approximately 5:30 a.m., but was instructed to return for a follow-up visit.

When he returned home, Avis continued to complain of bad headaches and pain in his abdomen. His condition worsened overnight. Early the next morning, Watts called

for an ambulance and Avis arrived at Wishard at 6:55 a.m. on October 20. Soon thereafter, Avis went into cardiac arrest and died. An autopsy later revealed that Avis died from multiple blunt force trauma to his head and abdomen, and strangulation. These injuries, which resulted from the October 19th attack, were not diagnosed during Avis's initial treatment.

Watts filed a proposed complaint with the Indiana Department of Insurance on October 19, 1998, alleging that Wishard committed medical malpractice resulting in Avis's death. In 2001, the Medical Review Panel issued its opinion concluding that Wishard "failed to meet the applicable standard of care and that such conduct probably was a factor of the resultant damages." Appellant's App. p. 15.

On October 3, 2001, Watts filed a complaint against Wishard in Marion Superior Court, both individually and as Administratrix for Avis's Estate. In the complaint, she alleged that Avis died as a result of Wishard's negligence, and as a result of that negligence, "Watts has been forced to forego [Avis's] services, love, care, affection, and companionship." Id. at 13-14.

On February 18, 2003, Wishard filed a motion for partial summary judgment requesting that the court limit "potentially recoverable damages to reasonable medical, hospital, funeral and burial expenses, and reasonable costs of administration[.]" Appellee's App. p. 1. Wishard argued that Watts's damages were limited under the Wrongful Death Statute because Watts was not Avis's "dependent next of kin." In response, Watts asserted that she was dependent on Avis because he provided assistance in the upbringing of his siblings. Appellant's App. p. 20. Watts also asserted that she

was entitled to pursue her claim for damages under the Child Wrongful Death Statute because Avis, who was twenty-one years of age, was enrolled in a program to obtain his GED. Id. at 21-22.

On June 9, 2003, the trial court granted Wishard's motion for partial summary judgment after concluding that Watts "failed to show that the decedent contributed to support plaintiff in a tangible and material way so as to satisfy the contribution prong of the test for dependency." Id. at 30. The court also concluded that Avis was not a "child" as that term is defined under the Child Wrongful Death Statute. Id. at 31.

Thereafter, Wishard admitted liability and a bench trial on the issue of damages was set for May 30, 2007. Twenty days before trial, Watts sought leave to amend her complaint to add a claim of negligent infliction of emotional distress. The court denied Watts's motion. A bench trial was held on May 30, 2007, and continued to July 23, 2007. At trial, Watts unsuccessfully sought to exclude the testimony of Wishard's expert witness on the issue of attorney fees. On August 28, 2007, the trial court issued an order awarding Watts $11,879.86 in actual damages and $40,000 in attorney's fees. Watts now appeals. Additional facts will be provided as necessary.

I. Partial Summary Judgment

When we review the grant or denial of summary judgment, we use the same standard of review as the trial court. Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Poznanski ex rel. Poznanski v. Horvath, 788

N.E.2d 1255, 1258 (Ind. 2003) (citing Ind. Trial Rule 56(C); Tom-Wat, Inc. v. Fink, 741 N.E.2d 343, 346 (Ind. 2001)).

> We consider only those facts which were designated to the trial court at the summary judgment stage. We do not reweigh the evidence, but instead liberally construe the designated evidentiary material in the light most favorable to the non-moving party to determine whether there is a genuine issue of material fact.

St. Joseph County Police Dept. v. Shumaker, 812 N.E.2d 1143, 1145 (Ind. Ct. App. 2004), trans. denied.

Indiana Code section 34-23-1-1 ("the Wrongful Death Act") provides in pertinent part:

> When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she, as the case may be, lived, against the latter for an injury for the same act or omission. . . . The remainder of the damages, if any, shall, subject to the provisions of this article, inure to the exclusive benefit of the widow or widower, as the case may be, and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased. If such decedent depart this life leaving no such widow or widower, or dependent children or dependent next of kin, surviving her or him, the damages inure to the exclusive benefit of the person or persons furnishing necessary and reasonable hospitalization or hospital services in connection with the last illness or injury of the decedent, performing necessary and reasonable medical or surgical services in connection with the last illness or injury of the decedent, to a funeral director or funeral home for the necessary and reasonable funeral and burial expenses, and to the personal representative, as such, for the necessary and reasonable costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee, and in case of a death under such circumstances, and when such decedent leaves no such widow, widower, or dependent children, or dependent next of kin, surviving him or her, the measure of damages to be recovered shall be the total of the necessary and reasonable value of such hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney fees.

Watts argues that whether she was Avis's dependent next of kin is a genuine issue of material fact, and therefore, the trial court erred when it granted Wishard's motion for partial summary judgment.

> A decedent need not have been legally obligated to support an individual for that person to qualify as a "dependent next of kin" under the [Wrongful Death Statute]. Neither is total dependence required.
>
> The person claiming dependence must, however, "show a need or necessity for support . . . coupled with the contribution to such support by the deceased." As explained in Luider v. Skaggs, 693 N.E.2d 593, 596-97 (Ind. Ct. App. 1998) (citation omitted), "Pecuniary loss is the foundation of the wrongful death action. This loss can be determined in part from the assistance that the decedent would have provided through money, services or other material benefits."

Estate of Sears ex rel. Sears v. Griffin, 771 N.E.2d 1136, 1139 (Ind. 2002) (citations omitted.). "Services must go beyond merely helping other family members, even those who have relied on that assistance." Id.

At the time of his death, Avis was unemployed and did not contribute to Watts's household finances. Aside from Avis's love and affection, Watts claims only that she required Avis's assistance in the upbringing of his school-age siblings. However, the record does not support Watts's claim. The evidence designated to the trial court established that Watts averaged an eight-hour work-week in 1996. From this evidence, we can only infer that Watts was minimally dependent on Avis for assistance with his siblings. Accordingly, Watts has failed to designate any evidence to support her claim that she was Avis's dependent next of kin.

In the alternative, Watts argues that the trial court erred when it concluded that she is not entitled to relief under the Child Wrongful Death Statue as a matter of law. On the date of Avis's death, the Child Wrongful Death Statute, defined the term "child" as "an

unmarried individual without dependents who is: (1) less than twenty (20) years of age; or (2) less than twenty-three (23) years of age and is enrolled in an institution of higher education or in a vocational school or program."[1] Ind. Code § 34-23-2-1 (1999 & Supp. 2007).

Watts argues that Avis qualified as a "child" under the statute because he was twenty-one years old and enrolled in a program through Indianapolis Public Schools to obtain his GED. Wishard argues that Avis's enrollment in the GED program does not qualify as a "vocational school or program."

The term vocational means "of relating to, or undergoing training in a skill or trade to be pursued as a career." See Merriam-Webster website at http://www.merian-webster.com. Because a GED program is a program of general education and not specific training for a skill or trade, a GED program does not qualify as a vocational program. We therefore conclude that the trial court properly determined that Avis does not qualify as a "child" under the Child Wrongful Death Statute.

Consequently, the trial court did not err when it granted Wishard's motion for partial summary judgment.

II. Motion to Amend Watts's Complaint

Next, Watts argues that the trial court abused its discretion when it denied her motion to amend her complaint to add a claim of negligent infliction of emotional distress. Indiana Trial Rule 15 governs the amendment of pleadings and provides, in

[1] The General Assembly amended the statute in 2007, and it now defines the term "child" as "an unmarried individual without dependents who is: (1) less than twenty (20) years of age; or (2) less than twenty-three (23) years of age and is enrolled in a postsecondary educational institution, or a career and technical education school or program that is not a postsecondary educational program."

pertinent part: "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires." Amendments to the pleadings are to be liberally allowed. Hendrickson v. Alcoa Fuels, Inc., 735 N.E.2d 804, 817 (Ind. Ct. App. 2000).

The trial court retains broad discretion in granting or denying amendments to pleadings, and we will reverse only upon a showing of abuse of that discretion. Id. "In determining whether the trial court abused its discretion, we look to a number of factors, including 'undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiency by amendment previously allowed, undue prejudice to the opposing party by virtue of the amendment, and futility of the amendment.'" Leeper Elec. Servs., Inc. v. City of Carmel, 847 N.E.2d 227, 230-31 (Ind. Ct. App. 2006), trans. denied (quoting Palacios v. Kline, 566 N.E.2d 573, 575 (Ind. Ct. App. 1991)).

Watts filed her complaint in Marion Superior Court against Wishard on October 3, 2001. A bench trial on the issue of damages was set for May 30, 2007, over five and one-half years after Watts's complaint was filed. Twenty days before trial, Watts unsuccessfully sought leave to amend her complaint to add a claim of negligent infliction of emotional distress. Watts could have, but failed to, raise her negligent infliction of emotional distress claim in her initial complaint. Furthermore, Wishard admitted liability for negligently treating Avis, and the only issue remaining for trial was damages. It is therefore reasonable to conclude that the late-hour amendment would have placed an unreasonable burden upon Wishard, or would have resulted in delaying the case, which

had already been pending for over five and one-half years.[2] For all of these reasons, we conclude the trial court did not abuse its discretion when it denied Watts's motion to amend her complaint.

III. Attorney Fees

The parties have raised several arguments with regard to the attorney fees award. First, Watts argues that Wishard's attorney fees expert did not possess the requisite skill, knowledge or experience to testify as an expert witness, and therefore, the trial court abused its discretion when it relied on that testimony in awarding attorney fees. Wishard cross-appeals and argues that the trial court's attorney fees award was excessive.

A. *Testimony of Wishard's Attorney Fees Expert*

Watts argues that Wishard's attorney fees expert, attorney Robert Shula ("Shula"), did not meet the requirements for expert witnesses established by Evidence Rule 702. Rule 702 provides in pertinent part:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"The trial court's determination regarding the admissibility of expert testimony under Rule 702 is a matter within its broad discretion, and will be reversed only for abuse of that discretion." Sears Roebuck and Co. v. Manuilov, 742 N.E.2d 453, 459 (Ind. 2001).

[2] Watts argues that Wishard had constructive notice of her claim for negligent infliction of emotional distress, and her claim "was readily apparent from the evidence to be adduced at trial and the pleadings set forth prior to trial." Br. of Appellant. Watts's argument in this regard is unavailing. Watts's complaint does not contain any factual allegations that would provide Wishard with constructive notice of her claim for negligent infliction of emotional distress.

Watts argues that Shula "lacked the requisite skills, knowledge, and experience to testify as an expert regarding the appropriateness and reasonableness of fees charged by a plaintiff's attorney." Br. of Appellant at 22. Specifically, Watts argues that Shula primarily worked as a medical malpractice defense attorney, and therefore "was not qualified to testify regarding billing from the perspective of a plaintiff." Id. at 23. In response, Wishard notes that Shula has over forty-five years of experience as a practicing attorney. Since 2005, Shula has primarily practiced as a medical malpractice plaintiff's attorney. Tr. p. 159.

Much of Shula's forty-five year practice has been devoted to medical malpractice cases. Although the majority of his experience has been as a defense attorney, he has also practiced as a plaintiff's lawyer. Given Shula's experience as a practicing attorney, and his extensive knowledge of medical malpractice litigation, we conclude that the trial court did not abuse its discretion when it admitted his expert testimony concerning attorney fees.

B. *Attorney Fees Award*

Next, the parties dispute the reasonableness of the $40,000 attorney fees award. Watt's counsel requested an attorney fees award in excess of $145,000. In its cross-appeal, Wishard argues that our court should reduce or completely eliminate the $40,000 attorney fees award.

"What constitutes reasonable attorney fees is a matter largely within the trial court's discretion." Franklin College v. Turner, 844 N.E.2d 99, 105 (Ind. Ct. App. 2006). In determining whether a fee is reasonable, the trial court may consider such factors as

the hourly rate that is charged, the result achieved, and the difficulty of the issues that are involved in the litigation. Id. Finally, "[t]he trial judge is considered to be an expert on the question and may judicially know what constitutes a reasonable attorney's fee." Rand v. City of Gary, 834 N.E.2d 721, 723 (Ind. Ct. App. 2005), trans. denied (citing Glover v. Torrence, 723 N.E.2d 924, 938 (Ind. Ct. App. 2000).

The trial court concluded that an attorney fees award of $40,000 was reasonable after finding that:

> 2. Plaintiff's Counsel accepted the case on a contingency fee basis.
>
> 3. Plaintiff's Counsel did not keep contemporaneous time entries.
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> 4. Plaintiff's Counsel failed to identify which individual attorney or other person actually performed the tasks.
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> 5. Plaintiff's Counsel did not substantiate the rate upon the experience, reputation, and the ability of any particular lawyer performing the service even though there were four different attorneys who worked on the matter.
>
> 6. Plaintiff's Counsel charged attorney rates for tasks that should have performed by paralegals, secretaries, or law clerks.
>
> 7. Plaintiff's Counsel spent excessive time on many tasks.
>
> 8. Plaintiff's Counsel is not entitled to fees for defending fees.
>
> 9. Plaintiff's Counsel's fee request is unreasonable in light of the amount awarded to the plaintiff.

Appellant's App. pp. 86-87.

Nearly ten years have passed since Watts filed a proposed complaint with the Indiana Department of Insurance on October 19, 1998. It is evident from the record that

Watts's numerous attorneys have expended hundreds of hours working on this case.[3] However, there was evidence that Watts's attorneys did not keep contemporaneous time records of the work performed, that they were attempting to recover attorney fees for work that could have been performed by administrative or clerical staff, and that they billed unreasonable amounts of time to review letters and draft or research simple motions. For example, Watts's counsel billed attorney fees for such tasks as hand delivering service copies to opposing counsel, filing, and copying documents from the court's file. Also, counsel billed ten hours to research and draft a less than one page motion to certify the trial court's summary judgment order for interlocutory appeal and a nearly identical motion to reconsider. Appellee's App. p. 147. In another instance, counsel billed over one hour to prepare a motion for enlargement of time. Id. at 146. Finally, we observe that the trial court found that Watts's counsel improperly requested attorney fees for defending the reasonableness of their attorney fees request.

For these reasons and the fact that Watts's was awarded a judgment of less than $12,000, we conclude that the trial court properly determined that Watts's counsel's request for over $145,000 in attorney fees was excessive and unreasonable.[4] However,

[3] The parties devote much of their argument to the issue of whether the hourly rates for Watts's various attorneys were reasonable. Much of this argument centers around Attorney Shula's testimony that Watts's attorneys hourly rates were too high. Although the trial court certainly considered this testimony in fashioning its attorney fee award, the hourly rate evidence was simply one factor the court considered in issuing is $40,000 award. Therefore, we need not separately address whether the specific hourly rates for Watts's attorneys were reasonable.

[4] Pursuant to Indiana Rule of Professional Conduct 1.5(a):

> The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;

because this case has pended for nearly a decade and Watts's counsel have expended hundreds of hours litigating the matter, we also reject Wishard's argument that the attorney fees award should be reduced or eliminated. Accordingly, we conclude that the trial court did not abuse its discretion when it awarded $40,000 in attorney fees to Watts's counsel.

IV. Findings of Fact and Conclusions of Law

At the conclusion of trial, the court ordered the parties to submit post-trial briefs and proposed orders. On August 22, 2007, the parties submitted post-trial briefs. With its post-trial brief, Wishard filed proposed findings of fact and conclusions of law. On August 28, 2007, the trial court issued its judgment. The next day, Watts unsuccessfully moved to strike Wishard's findings of fact and conclusions of law. [5]

On appeal, Watts argues, "[a]llowing just one party to submit proposed findings is prejudicial in not giving the other party the equal opportunity to submit her proposed findings." Br. of Appellant at 28. We cannot conclude that Watts was prejudiced because Wishard submitted proposed findings of fact and conclusions of law with its post-trial brief. Watts was adequately provided with an opportunity to argue the evidence in her post-trial brief. Consequently, she has not shown that the result of this proceeding

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(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

[5] Watts asserts that she did not receive the trial court's judgment until August 30, 2007. Reply Br. of Appellant at 21.

would have differed had the trial court either stricken Wishard's proposed findings or allowed her additional time to file proposed findings.

Conclusion

The trial court properly granted Wishard's motion for partial summary judgment and acted within its discretion when it denied Watts's motion to amend her complaint. The trial court did not abuse its discretion when it admitted Attorney Shula's testimony concerning attorney fees and when it issued its $40,000 attorney fees award. Finally, Watts did not establish that she was prejudiced by the trial court's denial of her motion to strike Wishard's proposed findings of fact and conclusions of law.

Affirmed.

MAY, J., and VAIDIK, J., concur.